March 26, 2008

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W., Room 11600
Washington, DC 20570-0001

Re: Notice of Rule of NLRB Procedure
73 Fed.Reg. 10,199 (February 26, 2008)
Joint Petitions for Certification Consenting to an Election

Comments of the California Nurses Association,
National Nurses Organizing Committee (CNA/NNOC)

Dear Mr. Heltzer:

The following are comments of the California Nurses Association, National Nurses Organizing Committee (CNA/NNOC) submitted in response to the Notice of a new NLRB rule of procedure concerning *Joint Petitions for Certification Consenting to an Election*, published in the Federal Register on February 26, 2008 pursuant to 5 U.S.C. § 552(a).

NLRB RULE CHANGE ALLOWING SUBSTANTIAL IMPAIRMENT OF EMPLOYEE NLRA RIGHTS TO CREATE EXCEPTION AND EMPLOYER SAFE HARBOR FROM PROHIBITION AGAINST COMPANY UNIONS

New NLRB Rule (RJ Petition)

The NLRB has put forward a new rule for administering procedures to certify exclusive collective

bargaining representatives under the NLRA which purports to create an exception and employer safe harbor from the NLRA § 8(a)(2) prohibition against company unions. The new rule:

- Eliminates the statutory requirement of a "question concerning representation" as a prerequisite for NLRB processing of a petition for certification of an exclusive representative under the new collaborative process
- Eliminates threshold "showing of interest" requirements for NLRB processing of a petition for certification of an exclusive representative under the new collaborative process – allows processing of petition without any evidence whatsoever of employee support for the employer's hand-picked union petitioner
- Offers special provisions for obtaining expedited election under consent election agreements for collaborative petitions which effectively precludes meaningful intervention of competing labor organization (e.g., requiring intervenors to satisfy current showing of interest requirements within compressed time limits which preclude any reasonable opportunity to meet the requirements)
- Undermines a new proposed law, the Employee Free Choice Act, supported by most of organized labor that would expand the democratic rights of workers to collective self determination and organization

Effects of New Rule

- The new rule grants employers unilateral authority to offer a special exclusive collective bargaining relationship to unions selected by the employer on terms acceptable to the employer.
- This new rule:
    - eliminates the "burdens" of organizing for certification as exclusive representative,
    - eliminates competition from rival unions,
    - insulates employers from Section 8(a)(2) liability and their selected union partners from Section 8(b)(1)(A) liability for an employer assisted recognition and certification as exclusive representative, and
    - affords unions willing to concede to employer terms of participation significant advantage over competing unions unwilling to meet employer terms or otherwise unacceptable to offering employers.

The New Rule Is Unlawful

Several elements of the new rule allowing collaborative petitions for certification of exclusive representatives are unlawful, including the following:

1. Employees are deprived of fundamental statutory rights of collective self-determination during the critical initial stage of organizing support for recognition or certification of an exclusive representative.

The essential purpose of the NLRA is to protect "*the exercise by workers of full freedom on, self-organization, and designation of representatives of their own choosing*." (29 U.S.C. § 151.) Collective self-determination is the core value of the fundamental statutory rights of employees to organize guaranteed by Section 7 of the NLRA:

> *Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .*" (29 U.S.C. § 157.)

The fundamental employee right of collective self-determination is the foundation for the entire statutory scheme of rights and obligations provided by the NLRA. The right of collective self-determination is exclusively a workers' right--it cannot be exercised by employers or labor organizations, or through employer/union collaborations. The statutory guarantee and protected exercise of this right is pervasive and not subject to limitation or preclusion in any particular phase of NLRB administration of the Act. The NLRB's new policy which eliminates showing of interest requirements for representation petitions and allows processing of collaborative employer/union petitions for certification of exclusive representatives without any evidence of employee support precludes employee exercise of the right of collective self-determination by eliminating these statutory and administrative protections.

Where a labor organization secures representation rights through a process that is not the product of legitimate self-determination by the workers to be represented, the workers have been deprived of their fundamental statutory rights and indentured to a collective bargaining and employment relationship that is not accountable to the democratic authority contemplated by the NLRA. Deprivation of fundamental rights of collective self-determination in the "organizing stage" of a petition for certification is not remedied by conduct of a representation election which limits selection to an exclusive representative not of the employees' own choosing, but in fact selected by the employer on terms acceptable to the employer.

2. The new rule exceeds the statutory authority of the NLRB because it purports to eliminate the statutory perquisite of a "question concerning representation" necessary for processing a petition for certification to election.

Section 9 of the NLRA authorizes employee or labor organization petitions "*alleging that a substantial number of employees . . . wish to be represented for collective bargaining*" by the petitioned for exclusive representative. (29 U.S.C. § 159(c)(1)(A).) The NLRB may process the petition to election "*if it has reasonable cause to believe that a question of representation exists . . . .*" (29 U.S.C. § 159(c)(1)(B).) The NLRB has created numerical showing of interest standards to determine the threshold statutory requirement for a showing that "*a substantial number of employees wish to be represented for collective bargaining*." The NLRB's new rule eliminates showing of interest

requirements in their entirety for petitions under the newly authorized collaborative process—collaborative petitions for certification of an exclusive representative can be processed to election without any employee support whatsoever. The new rule exceeds the NLRB's authority and is unlawful because it purports to eliminate the statutory prerequisite for processing a representation petition.

3. The new rule creates an exception and employer safe harbor from the prohibitions of Section 8(a)(2) of the NLRA.

The new rule authorizes a procedure for certification of an employer selected and assisted exclusive collective bargaining representative. The appearance of employee choice in a process for ratifying employer choice neither comports with the fundamental statutory guarantee and rights of employee free choice nor remedies the substantial conflict between the employer selected/assisted model of representation authorized by the new rule and the express prohibition of Section 8(a)(2). Current law prohibits employer assistance in a union's solicitation of authorization cards and showing of interest to obtain a representation election. The new NLRB rule grants employers authority to eliminate all showing of interest requirements for a petition for certification as exclusive representative by a union selected by the employer on terms acceptable to the employer. The rule authorizes unlawful employer assistance and support in violation of Section 8(a)(2) and therefore exceeds the NLRB's authority under the Act.

For the reasons stated herein, CNA/NNOC objects to the new rule and objects to the implementation of any procedure which follows the rule. We strongly urge the withdrawal of the new rule.

Sincerely,

David Johnson
Director of Organizing
CNA/NNOC